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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA
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12 AUSTIN COVINGTON,

13 Plaintiff,

14 v.

15 SAM WISE,

16 Defendant.

17 CASE NO. 3:20-cv-06173-LK

18 ORDER EXCLUDING
19 DEFENDANT'S NEWLY
20 PROPOSED EXHIBITS

21 This matter comes before the Court sua sponte regarding the admissibility of a set of new
22 exhibits Dr. Wise emailed to the Court on February 14, 2023 for introduction at trial on February
23 21, 2023. For the reasons set forth below, the Court excludes these exhibits.

24 **I. BACKGROUND**

25 On January 21, 2023, Mr. Covington filed a Second Amended Pretrial Order, Dkt. No. 96,
26 that listed his proposed exhibits. And at Dr. Wise's insistence, Mr. Covington listed "all the
27 exhibits his previous attorney identified as relevant to all the claims from both Plaintiffs," Dkt.
28 No. 99 at 2, even though only Mr. Covington's wage claim is proceeding to trial on February 21,
29 2023. Despite his obligation to cooperate in the process of drafting and filing the proposed pretrial

1 order, Dr. Wise “was unwilling or unable to identify which exhibits were relevant to the single
 2 wage claim before the court.” *Id.* at 2; *see also* Dkt. No. 100 at 5–13; LCR 16(k) (requiring parties
 3 to meet no later than ten days before the proposed pretrial order is filed to “enter into stipulations
 4 with reference to as many facts, issues, deposition excerpts, and exhibits as possible,” and to
 5 “cooperate in developing” a “single pretrial order[.]”).

6 On February 2, 2023, the Court issued an order to show cause why sanctions should not be
 7 imposed because Dr. Wise violated the Court’s scheduling order, Dkt. No. 92, by failing to file a
 8 proposed pretrial order by January 31, 2023. Dkt. No. 98 at 2. The Court warned that if Dr. Wise
 9 failed to either affix his signature to Mr. Covington’s proposed pretrial order or submit his own
 10 proposed pretrial order by February 8, 2023, it would adopt Mr. Covington’s Second Amended
 11 Pretrial Order as the pretrial order in this case, with slight modifications not relevant here. When
 12 Dr. Wise did not respond to the order to show cause or comply with its terms, the Court adopted
 13 Mr. Covington’s proposal, as modified, as the pretrial order. Dkt. No. 103 at 6.

14 **II. DISCUSSION**

15 On February 14, 2023, Dr. Wise emailed 42 documents to the Court’s Courtroom Deputy
 16 and asked her to upload them as exhibits. Under the Court’s Order Setting Trial Date and Related
 17 Dates, Dkt. No. 84, Dr. Wise’s exhibits should have been listed in the pretrial order by January 31,
 18 2023. *See also* LCR 16.1 (form of proposed pretrial order including exhibits). But Dr. Wise never
 19 submitted a pretrial order, despite this Court’s scheduling order and its order to show cause. And
 20 he never sought the Court’s permission to add the 42 new exhibits to the list of defense exhibits
 21 that Mr. Covington submitted in the Second Amended Pretrial Order.

22 Under Federal Rule of Civil Procedure 16(f), the Court may issue “any just orders,”
 23 including Rule 37 sanctions, “if a party . . . fails to obey a scheduling or other pretrial order.” Fed.
 24 R. Civ. P. 16(f)(1)(B)-(C). The available sanctions include “prohibiting the disobedient party . . .

1 from introducing designated matters in evidence[.]” Fed. R. Civ. P. 37(b)(2)(A) (incorporated by
2 reference into Rule 16(f)); *see also O'Connell v. Fernandez-Pol*, 542 F. App'x 546, 547–48 (9th
3 Cir. 2013) (“By the very nature of its language, sanctions imposed under Rule 37 must be left to
4 the sound discretion of the trial judge.”). Pursuant to that authority, the Court excludes Dr. Wise’s
5 newly disclosed exhibits because they were not included in the pretrial order and Dr. Wise has not
6 offered any explanation for his failure to do so. The Court has considered less severe sanctions,
7 including but not limited to imposing fines and continuing the trial yet again, but finds that they
8 would not be effective in light of the Dr. Wise’s continued failure to comply with the Court’s
9 orders and the Local Civil Rules.

10 Nor has Dr. Wise met the standard to introduce new exhibits after the pretrial order has
11 been accepted. In its February 9, 2023 order imposing sanctions, the Court “accept[ed] the
12 Plaintiff’s Second Amended Pretrial Order as the pretrial order in this case” with two exceptions
13 not relevant here. Dkt. No. 103 at 6. Once a district court has issued a final pretrial order,
14 modifications are permitted “only to prevent manifest injustice.” Fed. R. Civ. P. 16(e). “The
15 purpose of [the final pretrial] order is to guide the course of the litigation,” and “[o]nce formulated,
16 [it] should not be changed lightly[.]” *Id.*, Advisory Committee’s Note to 1983 Amendment (citing
17 *Clark v. Pa. R.R. Co.*, 328 F.2d 591 (2d Cir. 1964)). Indeed, the Ninth Circuit has “consistently
18 held that issues not preserved in the pretrial order have been eliminated from the action.” *Hunt v.*
19 *Cty. of Orange*, 672 F.3d 606, 617 (9th Cir. 2012) (quoting *S. Cal. Retail Clerks Union and Food*
20 *Emp’rs Joint Pension Trust Fund v. Bjorklund*, 728 F.2d 1262, 1264 (9th Cir. 1984)). The Ninth
21 Circuit has identified four factors district courts should consider when determining whether to
22 modify the final pretrial order:

- 23 (1) the degree of prejudice or surprise to the defendants if the order is modified; (2)
24 the ability of the defendants to cure any prejudice; (3) the impact of the

1 modification on the orderly and efficient conduct of the case; and (4) any degree of
 2 willfulness or bad faith on the part of the party seeking the modification.

3 *Id.* at 616 (cleaned up). Dr. Wise, as the party seeking to modify the pretrial order, bears the burden
 4 “to show that a review of these factors warrants a conclusion that manifest injustice would result
 5 if the pretrial order is not modified.” *Byrd v. Guess*, 137 F.3d 1126, 1132 (9th Cir. 1998),
 6 *superseded by statute on other grounds as recognized in Little v. City of Manhattan Beach*, 21 F.
 7 App’x 651, 652 (9th Cir. 2001).

8 The factors weigh in favor of excluding the new exhibits. Mr. Covington would be
 9 surprised if the pretrial order is modified to include Dr. Wise’s new exhibits after the Court held
 10 that it was accepting the previously filed version. Dkt. No. 103 at 6. And Mr. Covington would
 11 also be prejudiced if the Court were to allow dozens of new exhibits on the eve of trial, after the
 12 deadline to file motions in limine has passed. Dkt. No. 92 (motions in limine were due January 17,
 13 2023). It does not appear that the prejudice could be cured or mitigated. If the Court were to allow
 14 the new exhibits, it would likely have to move the trial date to allow Mr. Covington time to address
 15 them, undermining the orderly and efficient disposition of this case. As for the last factor, it does
 16 not appear that Dr. Wise’s conduct is the result of willfulness or bad faith, though it is unexplained.
 17 Therefore, he has not met his burden of demonstrating that manifest injustice would occur absent
 18 a modification of the pretrial order. See *Connecticut Fair Hous. Ctr v. CoreLogic Rental Prop.*
 19 *Sols., LLC*, No. 3:18-CV-705-VLB, 2022 WL 620735, at *2 (D. Conn. Mar. 3, 2022) (denying
 20 parties’ motion to amend the pretrial order less than a month before trial and noting that
 21 “[s]pringing on an opponent on the eve of trial several new exhibits” deprives the other side “the
 22 benefit of challenging the evidence in pretrial proceedings” and deprives the court of “the benefit
 23 of reviewing admissibility challenges prior to trial, which again is the preferable method of
 24 addressing predictable admissibility challenges”).

III. CONCLUSION

For the foregoing reasons, the Court EXCLUDES Dr. Wise's 42 newly proposed exhibits as set forth in this order.

Dated this 16th day of February, 2023.

Lauren King
Lauren King
United States District Judge